THE

MADRAS LAW JOURNAL.

I] JANUARY. [1944

THE MARCH OF LAW: 1943.

A number of striking decisions have been rendered during the year 1943. They all show that the law has not been static. In many cases there has been a broadening from precedent to precedent; in a few cases a regressive tendency stands exhibited. An attempt is here made to advert briefly to the effect of the decisions of the Privy Council, the Federal Court and the Madras High Court in regard to some branches of the law.

1. *The High Court—Its powers and jurisdiction.*—In *Emperor* v. *Benoari Lal Sharma*[1], the Federal Court recognises that though by section 223 of the Constitution Act the framers of the constitution have expressed their anxiety to preserve the powers and prestige of the High Courts unimpaired, yet, under the express terms of that very section it is within the competency of the Indian Legislature to alter the jurisdiction and powers of the High Court and undoubtedly the Governor-General has power to legislate by Ordinance in case of emergency in respect of the powers and jurisdiction of the High Courts.

The decision of the Judicial Committee in *Ryots of Garabandho* v. *Zamindar of Parlakimedi*[2] that the High Court has no power to issue writs of *certiorari* to run into the mofussil has cut deeply into what has hitherto been regarded as well-established law and negatives the existence in the High Court of a power whose exercise in the past had operated as a potent check on and corrective of arbitrary actions by inferior tribunals exercising quasi-judicial powers. Of paramount importance is the pronouncement of the Privy Council in *Debi Prasad Sharma* v. *Emperor*[3], where it is pointed out that the jurisdiction in contempt which the High Court possesses should only be sparingly used and always with reference to the administration of justice and that the proper procedure in the case of an attack against a judge as an individual and not referring to the administration of justice will be to issue a simple contradiction or . . . . . if the matter amounted to a libel to pursue the remedies open therefor in law.

2. *The Bar—Its rights and disabilities.*—Notable points concerning the rights and disabilities of legal practitioners have come to the fore in two decisions of the High Court. The judgment of the Full Bench in *In the matter of a Pleader*[4], constitutes by implication at any rate a qualification of the rule propounded in *In the matter of a Pleader, Trichinopoly*[5], that since an advocate in this Presidency combines in himself the functions of both a solicitor and a barrister he is subject to the disabilities of both. The decision points out that an advocate here is not exactly in the same position as a barrister in England because there is here only a single agency and hence there is no reason why an advocate should not be allowed to act as the Legal Adviser of a company of which he is a Director provided his

1. (1943) 2 M.L.J. 207 (F.C.).
2. (1943) 2 M.L.J. 254 (P.C.).
3. (1943) 2 M.L.J. 569 (P.C.).
4. (1943) 2 M.L.J. 273 (F.B.).
5. (1942) 2 M. L. J. 196: I. L. R. (1943) Mad. 30.

remuneration is fixed beforehand. The ruling in *Visvanathan Chettiar* v. *Appa Naicken*[1] is noteworthy as re-affirming that an advocate in India has the same implied authority to compromise as he has in England.

3. *Constitutional Law.*—There have been during the year a number of important pronouncements of the Federal Court involving the important issue of the liberty of the subject. In *Keshav Talpade* v. *Emperor*[2], the Court held that rule 26 of the Defence of India Rules went beyond the rule-making power conferred by section 2 (1) of the Defence of India Act, 1939, which gives power to frame rules providing for the apprehension, etc., of persons suspected of certain matters. Although it was not necessary for the decision of the case, the Federal Court strongly hinted their view that the reasonable suspicion justifying apprehension must be a suspicion which is not merely reasonable to the apprehending authority but which is reasonable in fact as well. That is, the Court can go into the question of the reasonableness of the suspicions of the apprehending authority. A somewhat different rule was propounded by the House of Lords in *Liversidge* v. *Sir John Anderson*[3], which turned on the construction of the similarly worded Emergency Powers Act of Great Britain, but the Federal Court did not follow the English analogy distinguishing that case by observing that the conditions in India regarding apprehension and detention were different from those obtaining in England. *Emperor* v. *Benoari Lal Sharma*[4] lays down that the Special Criminal Courts Ordinance II of 1942 which empowers the executive authorities to order cases or classes of cases to go before a Special Court set up by the Ordinance and which does not lay down any general principles by which the executive authorities are to be guided in the exercise of their discretion to transfer cases to the Special Court amounts to a delegation of legislative authority to executive authorities and hence is unconstitutional. In In re *Allocation of Lands in Chief Commissioners' Provinces*[5], the Federal Court has held that the rights of a Province in respect of land vested in His Majesty for the purpose of the province but situated outside it are analogous to those of a private owner. In this case, the Federal Court expressed anything but affection for the system of advisory opinions which is in vogue in Canada but is unpopular in the United States of America and in Australia. In *Jagannath Baksh Singh* v. *The United Provinces*[6], the Federal Court has held that the U. P. Tenancy Act which cut down the rights claimed by the taluqdars to be comprised in the grants of their estates did not amount to compulsory acquisition of land without payment of compensation [prohibited by section 299 (2) of the Constitution Act.] Again what section 300 prohibits is the exercise of the executive authority of a province in such a manner as to derogate from certain grants ; the section places no restrictions on and can have no reference to, the exercise of the legislative authority of the province. The doctrine that a grantor may not derogate from his own grant cannot be applied in such a way as to limit legislative powers. The decision in *Afzalur Rahman* v. *Emperor*[7] holds that a Police Officer who can be dismissed by the D. I. G. of Police cannot be deemed to be a person " not removable from his office save by or with the sanction of a provincial government," and accordingly sanction of the provincial government to prosecute such an officer is not necessary under section 197 of the Criminal Procedure Code.

In *Emperor* v. *Sibnath Bannerjee*[8], the effect of Ordinance No. 14 of 1943 which by section 2 amended the wording of section 2 (1) of the Defence of India Act, 1939, so as to bring it into line with the wording of rule 26 of the Defence of India Rules and which by section 3 validated orders previously made under rule 26, came up for consideration. The Court held, while leaving the question of the validity of section 2 of the Ordinance open, because there were doubts whether an Ordinance can amend an Act of the Legislature retrospectively, that section 3 was perfectly valid. The ruling in *Padmanabham* v. *Kamaraju*[9] holds that where a question as to the interpretation of the Government of India Act is not raised before the High Court no certifi-

1. (1943) 2 M.L.J. 168.
2. (1943) 2 M.L.J. 90 (F.C.).
3. (1942) A.C. 206.
4. (1943) 2 M.L.J. 207 (F.C.).
5. (1943) 2 M.L.J. 137 (F.C.).
6. (1943) 2 M.L.J. 114 (F.C.).
7. (1943) 2 M.L.J. 62 (F.C.).
8. (1943) 2 M.L.J. 468 (F.C.).
9. (1943) 1 M.L.J. 314.

cate that the case is fit to go on appeal to the Federal Court will be granted by the High Court under section 205 of the Constitution Act. *Keshav Talpade* v. *Emperor*[1] holds that in the exercise of its appellate jurisdiction the Federal Court is not bound to give a judgment; it will merely make a declaration as to the law in the light of which the High Court from which the appeal has been carried must substitute a fresh judgment from the judgment appealed against.

4. *Criminal Law.*—An interesting point is made clear in In re *Mooka Nadar*[2] concerning the right of private defence. It holds that a person could not be deemed to lose possession of his land by merely going home for taking food or rest and that he could therefore defend his possession where necessary against an aggressor with force. In re *Vadivelu Asruthiyar*[3] decides a point, somewhat novel, and holds that forgery is committed even where a document is a false document in the name of a fictitious or non-existent person such as an idol.

5. *Hindu Law—(i) Adoption.*—Two decisions of the year in the law of adoption are of outstanding importance. *Kasi Viswanathan Chettiar* v. *Somasundaram Chettiar*[4] upholds the validity among Nattukottai Chettis of an adoption to a person after the death of his widow by a third party, namely, his father. The decision is given no doubt on foot of custom, but, in effect, it constitutes a qualification of the ordinary rule that none but a man or his widow can adopt to him. *Anant* v. *Shankar*[5] is a decision of the Privy Council which may be said to mark the triumph of logic over arguments of inconvenience and difficulties in application. It lays down that a valid adoption cannot be refused effect: the death of a sole surviving coparcener, be he a son or a collateral, cannot extinguish the capacity of the widow of a predeceased coparcener to adopt: nor can a partition among the coparceners before the adoption or the passing of the property by inheritance on the death of the sole surviving coparcener take away the power of the predeceased coparcener's widow to adopt. On adoption, the adopted son will be entitled to the property, whether ancestral or separate, of his father and hence can divest the same from the person in whom it had vested.

(ii) Joint family.—*Bhurumal* v. *Jagannath*[6] points out that in regard to a business carried on in the name of a coparcener there is no presumption that it is a joint family business though the joint family is possessed of some property. *Venkatachellam* v. *Venkateswara Rao*[7] lays down that it is not an invariable rule of law that a Hindu joint family in which there are minors cannot start a fresh joint family business. *Venkataramiah* v. *Tatayya*[8] elucidates that where one member of a family separates himself leaving the rest to continue together, the theory of re-union cannot arise at all; while the ruling in *Bhagabati Dei* v. *Muralidhar Sahu*[9] points out that where there has been a partition it requires very cogent evidence to establish a re-union. A far reaching pronouncement is to be found in *Rev. Kolandai* v. *Rev. Gnanavaram*[10] where it has been held that according to the Hindu religion, true piety transcends castes and creeds, that a Church is or at any rate should be as sacred to a devout Hindu as a temple must be to the true Christian and that it is within the competence of the manager of a joint Hindu family, owning considerable properties to make a gift of a small fraction of it for the erection of a church.

(iii) Succession.—The position of a half sister in the line of heirs as being immediately after a full sister and before a paternal uncle as implicit in the term "sister" in Act II of 1929 has been affirmed by a singularly strong series of decisions such as *Papammal* v. *Meenammal*[11], *Musammat Sahodra* v. *Ram Babu*[12] and *Musammat Besar Kuar* v. *Bishun Dev Singh*[13]. The decision in *Nagamma* v. *Linga Reddy*[14] is noteworthy for its repudiation finally of the validity of Dr. Sarvadhikari's "line

1. A.I.R. 1943 F.C. 72 (F.C.).
2. (1943) 1 M.L.J. 352.
3. (1943) 2 M.L.J. 445.
4. (1943) 1 M.L.J. 195.
5. (1943) 2 M.L.J. 599 (P.C.).
6. (1943) 1 M.L.J. 70 (P.C.).
7. (1943) 2 M.L.J. 610.
8. (1943) 2 M.L.J. 83.
9. (1943) 2 M.L.J. 68 (P.C.).
10. (1943) 2 M.L.J. 664.
11. (1943) 1 M.L.J. 1 : I.L.R. (1943) Mad. 235 (F.B.).
12. (1943) 1 M.L.J. 180 (P.C.).
13. (1943) 2 M.L.J. 459 (P.C.).
14. (1943) 1 M.L.J. 367: I.L.R. (1943) Mad. 759 (F.B.).

theory" in *bandhu* succession and for its laying down that in order that a person may inherit as a *bandhu* he has to satisfy only the test of degree and the test of mutuality and nothing more.

(*iv*) *Debts.*—The Privy Council ruling in *Hemraj* v. *Khemchand*[1] points out that the term "avyavaharika debt" does not admit of any more precise definition than Colebrooke's translation of it as a debt for a cause repugnant to good morals and affirms the view that it is the character of the debt at the time when the liability was first incurred that should be regarded to determine whether the doctrine of pious obligation attaches or not. The ruling in *Lakshmanaswami* v. *Raghavacharyulu*[2] makes it clear that all that the son has to prove to establish his immunity from pious obligation, in a suit by a creditor for the enforcement of the father's debt, is the immoral character of the debt; and that he need not show further that at the time of lending money the creditor had knowledge of the immoral purpose.

(*v*) *Maintenance.*—*Venkatasubbarathnamma* v. *Krishnayya*[3] takes special importance as being probably the first decision to assess the repercussions of the widow's rights of inheritance in respect of the non-agricultural property of her husband on her right to maintenance against his other property. It holds that in so far as the Act XVIII of 1937 does not take effect on certain property, the widow's old right of maintenance is preserved, but, in assessing the amount of maintenance, allowance should be made for the property which comes to her under the Act. The decision in *Venkataramaraju* v. *Rajagopalaraju*[4] is interesting for the principle laid down, which will be applicable to all matrimonial litigations irrespective of the religion or caste of the parties, namely, that condonation cannot be conditional and when cohabitation between the wife and husband has been resumed, the husband cannot be deemed to be on probation so that the previous cause of action regarding separate maintenance on foot of cruelty can be revived at will if the wife is not satisfied with the husband's behaviour.

(*vi*) *Mahomedan Law.*—*Ramija Bibi* v. *Sharifa Bibi*[5] holds that *Beeju Bee's case*[6] is not overruled by the Privy Council in *Maina Bibi* v. *Chaudhry Vakil Ahmad*[7] and that when a Mahomedan widow has not been paid her dower she is entitled to retain possession of her husband's properties and the properties cannot be divided among the heirs until the dower has been satisfied. In *Zohara Khatum Bibi* v. *Mahbub Bi*[8] it is held that the fact that a gift was conditional on the donee paying the rents to the donor during her lifetime will not detract from the validity of the gift.

(*vii*) *Insolvency.*—Perhaps the most far-reaching of the decisions on Insolvency law is that of the Privy Council in *Mahomed Siddique Yusuf* v. *Official Assignee of Calcutta*[9] where it has been held that an order of adjudication under the Presidency Towns Insolvency Act, is conclusive and the finding therein that the transfer alleged as the act of insolvency was one by way of fraudulent preference binds the transferee even if he was not a party to the adjudication proceedings and that his only remedy will be to prefer an appeal against the order of adjudication in so far as it affects him. Equally important is the ruling of their Lordships in *Chockalingam Chettiar* v. *Official Assignee of Madras*[10], where Lord Russell of Killowen has laid down that on the insolvency of the undivided son of a deceased father, the creditors of the latter will be entitled to be paid in priority before the separate estate of the father is applied to any extent in paying the son's creditors but that the father's creditors will not be entitled to any such priority in respect of the joint family estate. *Nagiah* v. *Satyanarayana Prasad*[11] points out that the creditor's refusal to receive monies deposited in Court, though he was entitled to payment under an order of Court, will be sufficient proof of his *mala fides* in presenting an application for adjudication which should therefore be

1. (1943) 2 M.L.J. 397 (P.C.).
2. (1943) 1 M. L. J. 104 : I. L. R. (1943) Mad. 717.
3. (1943) 1 M.L.J. 235.
4. (1943) 2 M.L.J. 641.
5. (1943) 1 M.L.J. 303.
6. (1919) 37 M.L.J. 627 : I.L.R. 43 Mad. 214 (F.B.).
7. (1924) 48 M.L.J. 667 : L.R. 52 I.A. 145 : I.L.R. 47 All. 250 (P.C.).
8. (1943) 2 M.L.J. 99.
9. (1943) 2 M.L.J. 160 (P.C.).
10. (1943) 1 M.L.J. 239 : I.L.R. (1943) Mad. 603 (P.C.).
11. (1943) 1 M.L.J. 262.

deemed to be an abuse of the process of Court. The decision in *Thangavelu Chetti* v. *Chockalingam Chetti*[1] recognises the principle that where the whole reason and basis of an order directing the sale of property have disappeared the Court should save from sale the property of the insolvent, as for instance, where all the creditors have been paid in full. *Virupaksha Reddi* v. *Chanalal Siva Reddi*[2] makes it explicit that under the Provincial Insolvency Act neither the father's nor the manager's power to sell the shares of the other members of the family can vest in the Official Receiver on the adjudication as insolvent of a father or manager in a joint Hindu family and thus completes the picture drawn in *Rama Sastrulu's case*[3]. *Chanbasappa* v. *Official Receiver of Bellary*[4] lays down that the very order vesting the properties in an appointee on the annulment of insolvency implies that he might sell the property and distribute the proceeds among the creditors without applying for any special directions to sell. The ruling in *Karunakara Menon* v. *Sankaran Unni*[5] points out that there is an analogy between annulment of adjudication and the granting of an absolute order of discharge with the result that even after the passing of an order of complete discharge, proceedings pending under section 53 or section 54 could be continued by the Official Receiver unless orders to the contrary are made. The Privy Council decision in *Govinda Prasad* v. *Pawan Kumar*[6] clarifies a point on which previously there was no definite lead, by laying down that the words "annulled under this Act," in section 78 (2) would include an annulment resulting from the setting aside of the adjudication by an appellate Court, apart from the annulling under the express provisions of the Act.

(*viii*) *Property.*—In spite of a contrary opinion held by some of the other High Courts a Full Bench of the Madras High Court has in *Kanakamma* v. *Krishnamma*[7] reaffirmed its earlier view that section 53 (*a*) of the Transfer of Property Act has retrospective operation. The limits of the duty of a vendor in regard to production of title deeds for inspection by the vendee are set out in *Ratna Bai* v. *Mrs. Barras*[8] by stating that the seller's duty is only to produce the documents in his possession or power and that a vendee is not entitled to search for and obtain copies of other documents at the vendor's expense. The ruling in *Subba Rao* v. *Varadiah*[9] deals with the interesting point whether the benefit of reduction in a mortgage debt payable by a person consequent upon scaling down under the Madras Agriculturists' Relief Act could be claimed by the buyer of property, where the sale was free from encumbrances and a portion of the purchase money had been left with him for the specific purpose of discharging the mortgage of the property. The decision in *Egmore Benefit Society* v. *Aburupammal*[10] by holding that a mortgagee cannot in the exercise of a private power of sale conferred on him by the mortgage deed, buy the mortgaged property himself in spite of the existence of a covenant in the deed enabling him to do so, illustrates how peremptory is the rule that a man cannot contract with himself a principle based upon public policy. *Sivaraj Lal* v. *Mylapore Hindu Permanent Fund, Ltd.*,[11] constitutes a valuable exposition of the law relating to a mortgagee's liability to account on the footing of wilful default and holds that no such liability can arise in a case of mortgage with possession and lease back to the mortgagor, where the mortgagee never had actual possession. A point in the law relating to contribution under section 82 of the Transfer of Property Act is illustrated in *Damodaraswami Naicken* v. *Govindarajulu Naidu*[12] where it is ruled that the words "in the absence of a contract to the contrary" in section 82 relate only to a contract to which the mortgagee is a party and such a contract will run with the land. The decision in *Ramlal Dutt Sarkar* v. *Direndranath Roy*[13] is noteworthy as the first authoritative pronouncement by the Privy Council that the English doctrine of suspension of rent, where a tenant has not been given possession of a portion of the land demised, the rental

1. (1943) 2 M.L.J. 572.
2. (1943) 2 M.L.J. 87.
3. I.L.R. (1943) Mad. 83 (F.B.).
4. (1943) 1 M.L.J. 127.
5. (1943) 2 M.L.J. 134.
6. (1943) 2 M.L.J. 121, 125 (P.C.).
7. (1943) 1 M.L.J. 337 (F.B.).
8. (1943) 1 M.L.J. 461.
9. (1943) 1 M.L.J. 279.
10. (1943) 1 M.L.J. 93.
11. (1943) 1 M.L.J. 472: I.L.R. (1943) Mad. 430.
12. (1943) 1 M.L.J. 291.
13. (1943) 1 M.L.J. 514 (P.C.).

being a lump rental, is inapplicable in India. Sir George Rankin points out that the doctrine could not be followed in this country even as a matter of justice and equity in view of the difference in the conditions prevalent here. "The English context of English decisions must be borne in mind—the social system, the character of the country side, the well-settled boundaries, the limited term of leases."

Estates Land Act.—The precise significance of the term "whole village" in the context of section 3, sub-section 2, clause (*d*) of the Estates Land Act fell to be expounded in *Ademma* v. *Satyadhyana Thirthaswami Varu*[1] and *Suri Reddi* v. *Agnihotrudu*[2] where it has been made clear that if the area comprised in the grant is less than the total area of the village, the grant will not be a grant of the whole village. A point of practical importance is laid down in *Ramakrishnayya* v. *Krishnayya*[3] which holds that in the case of land becoming an estate by virtue of Madras Act XVIII of 1936 proceedings for settlement of rent are not necessary prior to the filing of suits for the recovery of rent. The decision of the Privy Council in *Ryots of Garabhando* v. *Zamindar of Parlakimedi*[4] is one of considerable importance in regard to the principles guiding settlement of rent under Chapter XI of the Estates Land Act. Dissenting from the observation of the Madras High Court that the words—"shall have regard to the provisions of this Act for determining the rates of rent payable by a ryot"—in section 168 (2) can only apply to the provisions of the Act which have general application, and approving the view that the requirement to have regard to the provisions of the Act has no more definite or technical meaning than that of ordinary usage, Viscount Simon, L.C., points out that while in Chapter III of the Act the existing rent is a statutory *datum line*, under Chapter XI the existing rent has only the benefit of a presumption and its fairness has to be probed.

Irrigation cess.—Two pronouncements of the Privy Council touch upon irrigation cess and one contains a valuable exposition of the law relating to water-rights. *The District Board of West Tanjore* v. *The Secretary of State*[5] recognises that the Board has now held in the *Swamigal case*[6] that the principles of the *Urlam case* would apply to inams also. The decision in *Secretary of State* v. *Thinnappa Chettiar*[7] lays down that in the case of grants by Government the extent if any of the right of taking water that would pass to the grantee would depend upon the terms of the grant in question; the fact that the grant consisted only of an assignment of land revenue and not of both varams may not be material; that the non-specification of the jamma at the time of the grant would only mean that the Government did not wish to detract from the grant by levying any rent and that like the Permanent Settlement and the Inam Settlement the grant in question constituted an 'engagement' with the Government within the meaning of Proviso 1 to section 1 of the Madras Irrigation Cess Act.

Contracts.—In *Raja Mohan Namucha* v. *Mansur Ahmad Khan*[8], the Judicial Committee has held that an agreement may be discovered to be void at a date subsequent to the agreement and that it does not necessarily follow that in every case where section 65 of the Indian Contract Act which deals with the restoration of benefits received by a party to an agreement which is discovered to be void is held to apply, the date of such a discovery must as a matter of law be equated with the date of such agreement. Again a person's right to recover monies under section 65 is not prejudiced either by reason that he bases his cause of action on the void agreement (because that does not amount to unequivocal election to stick to the latter remedy), or because he does not mention his rights under section 65 as a ground in the trial Court or in the lower appellate Court. In order to do substantial justice such a ground may be permitted to be taken for the first time before the final appellate Court as well. While in India, section 65 is clear on the point that in the case of void agreements any party who has received any benefit under such agreement must restore it, unfortunately in England on the authority of cases like

---

1. (1943) 2 M.L.J. 289.
2. (1943) 2 M.L.J. 528.
3. (1943) 2 M.L.J. 494.
4. (1943) 2 M.L.J. 254 (P.C.).
5. (1943) 2 M.L.J. 321 (P.C.).
6. (1942) 2 M.L.J. 367 : L.R. 69 I.A. 22 : I.L.R. (1942) Mad. 893 (P.C.).
7. (1943) 2 M.L.J. 382 (P.C.).
8. (1943) 1 M.L.J. 508 (P.C.).

Chandler v. *Webster*[1], a different rule has prevailed. It is satisfactory to note that the House of Lords has recently in the *Fibrosa case*[2] rid the English Law of this onerous heritage and laid down the law in consonance with the principles of natural justice. In *Kothandapani Mudaliar* v. *Dhanammal*[3], it has been held that past illicit cohabitation may validly support a promise to pay a sum of money. This decision is in accordance with the English law on the subject, but a catena of decisions of the Bombay High Court has taken a different view as also a decision of a single Judge of the Madras High Court. In *Taranatha Bhatta* v. *Gopalakrishnayya*[4], it has been held that a person's father-in-law's brother's wife cannot be said to stand in a near relation to him within the meaning of section 25 (1) of the Contract Act. *Ramaswami Aiyar* v. *Saptharishi Reddiar*[5] holds that where a person agrees to pay double the amount payable in case of default, such a stipulation is a penalty. Cases like *Kunju Nair* v. *Narayanan Nair*[6] which hold that where a person who has agreed to pay a certain sum by instalments undertakes to pay the whole sum in case of default in the payment of any instalment, such a clause is not a penalty, are distinguished. *Travancore National Bank Subsidiary Co., Ltd.* v. *Tranabank Union*[7] lays down that where a member of an unregistered union of the employees of a firm signs an agreement on behalf of the union the union cannot be sued on the contract and only the person who has signed can be proceeded against. In *Dalmia Cement Co., Ltd.* v. *Lourduswami Pillai*[8], the Court held that where a power is reserved under the terms of a contract to a party thereto to deviate from it, the power cannot be exercised, to add to, or deduct from the contract in such a way as to transform it into one, that is to all intents and purposes a new contract. Where a term of a building contract is that the building should be built with "granite jelly" if one party wishes to alter such a term into building with "lime stone jelly" the deviation will be one which practically extinguishes the original contract. *Muralidhar Chatterji* v. *International Film Co., Ltd.*,[9] lays down that money received by a party in part discharge of the consideration due or becoming due though applied for defraying the expenses of his part of the contract and spent for that purpose is nevertheless a benefit or advantage had by him liable to be restored under section 65 of the Indian Contract Act on his rescission of the contract. Sections 64 and 65 do not refer by the words 'benefit' and 'advantage' to any question of profit or clear profit nor does it matter what the party receiving the money may have done with it.

Agency.—*Valarshak Seth Apcar* v. *Standard Coal Co., Ltd.*,[10] has reference to a broker employed by a seller to introduce him to a prospective purchaser. Such a broker is entitled to be paid whatever is in the circumstances the usual commission on all contracts resulting from that introduction. It may well be that a subsequent contract is the fruit not of the introduction but of the satisfactory business relationship which the introduction established, in which case, it carries no commission for the broker.

Partnership.—*Hakim Rai* v. *Ganga Ram*[11] holds that in a suit for accounts brought nearly two years after the dissolution of a partnership against the former managing partner, interest is chargeable against the accounting defendant even though he has not acted fraudulently, from the date of the institution of the suit until realisation. *Suleman* v. *Abdul Latiff*[12] where such interest was not allowed is distinguishable because it was an ordinary suit for dissolution and winding up of the affairs of a going partnership. In *Gouri Dutt Ganesh Lal Firm* v. *Madhava Prasad*[13], it is laid down that where a person is taken as a partner in a joint Hindu family business and he acknowledges earlier debts the novation constituted by the substitution of the fresh partnership for the previous joint family liability is enough of itself to form a sufficient consideration for the new partner's undertaking to pay the firm's liabilities.

1. (1904) 1 K. B. 493.
2. (1942) 2 All.E.R. 122.
3. (1943) 1 M.L.J. 156.
4. (1943) 1 M.L.J. 422.
5. (1943) 1 M.L.J. 297.
6. (1932) 65 M.L.J. 29.
7. (1943) 1 M.L.J. 425.
8. (1943) 1 M.L.J. 303.
9. (1943) 2 M.L.J. 369 (P.C.).
10. (1943) 2 M.L.J. 405 (P.C.).
11. (1943) 1 M.L.J. 16 (P.C.).
12. (1930) 59 M.L.J. 121: L.R. 57 I. A. 245: I.L.R. 58 Cal. 208 (P.C.).
13. (1943) 2 M.L.J. 417 (P.C.).

Specific Relief.—In *Pitchayya* v. *Venkatakrishnayya*[1], it was held that an agreement to sell in favour of a person certainly gives him a right as to or in relation to the property which is the subject of the agreement. Hence such a vendee though he has no right "in any property" has a right "as to such property" within the meaning of section 42 of the Specific Relief Act. Under section 27 (*c*) specific performance can be decreed not merely against a party to the contract but also against a person claiming under a title which though prior to the contract and known to the plaintiff might have been displaced by the defendant. *Humayun Begum* v. *Mohamed*[2] lays down that "further relief" mentioned in section 42 is other relief against the defendant against whom a declaration is sought. The fact that the plaintiff has a ground for further relief against some one who is not a party to the suit or who has ceased to be such a party will not disentitle him to the declaratory relief under the section. *Subramaniam Chettiar* v. *Arunachalam Chettiar*[3] holds affirming *Veerasalingam* v. *Sathiraz*[4] that a suit by the vendor for the recovery of purchase consideration is a suit for specific performance within the meaning of Chapter II of the Specific Relief Act.

Negotiable Instruments.—*Rangiah Naidu* v. *Sundaramoorthi Mudaliar*[5] concedes the right of a person to plead the material alteration of a pro-note when sued thereon even when such an alteration is beneficial to him. In *Subramania Sastri* v. *Krishna Brahmam*[6], it was held that where on a pro-note the names of two persons are mentioned as payees and no firm's name of which they are partners has any mention, a suit by the two persons in their personal capacity is maintainable.

Company Law.—In *Public Prosecutor* v. *Coimbatore National Bank, Ltd.*[7], it was held that the failure of a company to report particulars of changes in other directorships held by one of the company's directors is an offence under section 87 (2) of the Companies Act even though the company has no knowledge of the change; and that the words "knowingly and wilfully" occurring in that section refer only to natural persons and not to artificial persons like companies. With respect, it may be pointed out that when a company can be made liable for torts involving fraud or malice, like malicious prosecution, defamation, fraudulent misrepresentation, etc., through the acts of its agents, it is a little difficult to see why it cannot be imputed with the knowledge referred to in the section gathered through its agents. Again the maxim that penal statutes should be construed strictly has reference only to cases where such construction would be beneficial to the accused and not to cases like the present one where such a construction would be destructive of the security of the accused. It may be that on necessary occasions penal statutes will have to be construed even in a liberal manner so as to favour the accused. *Public Prosecutor* v. *Anantakrishna Iyer*[8] holds that even a company incorporated before the Indian Companies (Amending) Act of 1936 which capitalises its reserve fund is guilty of failure to maintain the fund within the meaning of section 277 (*k*) (1) [which section prohibits the utilisation of the reserve fund in any way other than in accordance with section 277 (*k*) (3)]. *Radhakrishna Chettiar* v. *Official Liquidator*[9] holds that where a mortgage of any movable property of a company amounts also to a pledge, registration is not necessary under section 109 (1) of the Companies Act in order that the mortgage may be enforceable against the creditors of the company or the liquidator. *Karnataka Bank, Ltd.* v. *Ramchandra Rao*[10] holds that the power of a company under section 152 (1) to refer the disputes between it and another company to arbitration in accordance with the Indian Arbitration Act does not exclude the arbitration under the Civil Procedure Code. *Chokkalingam Chettiar* v. *Official Liquidator of Nagarathar National Bank*[11] lays down that an order directing public examination of the directors of a bank in liquidation is appealable under section 202 of the Companies Act; and that under section 196 notice need not be given to the

1. (1943) 1 M.L.J. 404.
2. (1943) 2 M.L.J. 76 (P.C.).
3. (1943) 2 M.L.J. 424 (F.B.).
4. (1908) 19 M.L.J. 220.
5. (1943) 1 M.L.J. 380.
6. (1943) 1 M.L.J. 61.
7. (1943) 1 M.L.J. 119.
8. (1943) 2 M.L.J. 19.
9. (1943) 1 M.L.J. 142.
10. (1943) 2 M.L.J. 489.
11. (1943) 2 M.L.J. 499.

directors of a company before the Court passes an order directing their public examination. *Calicut Bank, Ltd.* v. *Nekkat*[1] holds that even for continuing execution proceedings against a banking company which has been wound up the sanction of the Court is necessary under section 171.

Torts.—Hindusthan Gilt Jewel Works v. *Gangayya*[2] lays down that statements made by parties to a civil suit in pleadings are absolutely privileged provided the statement has reference to the enquiry. The ruling of the Full Bench in *Thiruvengada Mudali* v. *Thirupurasundari Ammal*[3] allowing only qualified privilege to statements made in complaints to Magistrates which was based on the interpretation of the relevant sections of the Indian Penal Code has no application to civil proceedings. *Mahomed Rowther* v. *Shanmugha Sundaram Chettiar*[4] rules that where a house used for the purpose of storing fireworks is gutted consequent on explosion that fact " talks " and hence in a suit for damages by the lessor against the lessee the onus is thrown on the latter to disprove negligence on his part. *Muhammad* v. *Chakkappayyan*[5] holds that the reasonable suspicion that an offence is about to be committed which justifies a police officer arresting a person without warrant without exposing himself to an action for false imprisonment means a *bona fide* belief that such an offence is likely to be committed. Again the fact that a police officer was acquitted in criminal proceedings relating to the same matter is no bar to an action for false imprisonment being brought against him subsequently.

There is evident a notable and recent tendency on the part of the English Courts to weed out the excrescences and anomalies of English law which have their roots in obsolete procedure and bygone legal history. One such instance is furnished by the recent decision of the Court of Appeal in *Simon* v. *Islington Borough Council* which holds that the anomalous rule of immunity for non-repair of roads claimed by and allowed to local authorities, by a consistent trend of decisions beginning with *Cowley* v. *New Market Local Board*, applies only to the non-repair of the road as such and has no application where the authority has undertaken other duties in regard to the road by breach of which damage is caused ; in the latter case the local authority is liable. But our interest in the case lies in the fact that even in India this legal relic was cited to negative the liability on the part of Municipal Councils for the non-repair of roads in cases like *Achratlal* v. *Ahmedabad Municipality*[6]. The recent decision of the Court of Appeal should help to check such a tendency and prevent the injustice of enthroning of the " *lex* " when the " *ratione legis* " on which it was based has been knocked out.

Civil Procedure Code.—The decision in *Mani Lal* v. *Venkatachalapathi Aiyar*[7] is valuable as re-affirming the principle, which had sometimes been questioned, that an offer when accepted by post is accepted at the place where the letter of acceptance is posted and therefore the cause of action arises there. In *Muthukaruppa Ethandar* v. *Appavu Nadar*[8], it is laid down that where there is a debt payable by an entire village, a representative suit to enforce its payment will lie and the fact that permission to sue the defendants named in the plaint as the representatives was accorded not before but after the notification by public advertisement of the institution of the suit, will not, where no prejudice was caused, amount to a contravention of Order 1, rule 8.

Tirupathi Devasthanams Committee v. *Krishnayya Shanbogue*[9] is an important ruling of a Full Bench of five Judges that a suit by the general trustees of a temple against a trustee of a fund contributed by the devotees for being made over to the temple praying for a decree directing accounts and enquiries and for the recovery of the amount to be ascertained on the taking of accounts, is not within the meaning of section 92, Civil Procedure Code, and does not require the Advocate-General's

1. (1943) 2 M.L.J. 448.
2. (1943) 1 M.L.J. 186 : I.L.R. (1943) Mad. 685.
3. (1926) 51 M.L.J. 112 : I.L.R. 49 Mad. 728 F.B.).
4. ((1943) 1 M.L.J. 188.
5. (1943) 1 M.L.J. 447.
6. (1904) I.L.R. 28 Bom. 340.
7. (1943) 1 M.L.J. 352.
8. (1943) 1 M.L.J. 454.
9. (1943) 1 M. L. J. 388 : I.L.R. (1943) Mad. 619 (F.B.).

UNIVERSITY OF CALCUTTA NOT TO BE RE...

sanction. The decision indicates that in determining whether a suit falls under section 92 the Court must go beyond the reliefs sought and have regard to the capacity in which the plaintiffs are suing and to the purpose for which the suit is brought. In *Fatima Bibi* v. *Mohammad Usman Sahib*[1] it is pointed out that while an order for attachment does not interfere with adverse possession the filing of a suit for a declaration of the right to attach the property against the person in possession is another matter. The ruling of the Federal Court in *Venugopala Reddiar* v. *Krishnaswami Reddiar*[2] makes it clear that the Constitution Act has not taken away the jurisdiction of British Indian Courts to continue the suit concerning immovable property situate in Burma as part of the subject of the suit which had been filed under section 17, Civil Procedure Code, before the separation of Burma from British India.

Anjayya v. *Gundarayudu*[3] is a notable pronouncement which holds that an appeal does lie from an order of the Court purporting to make the order under a provision of law wrongly assumed by it to be applicable, provided that an appeal is ordinarily permitted against orders rightly made under that provision. The ruling of the Full Bench in *Venkata Rao* v. *Satyanarayanamurthi*[4] lays down that a defendant-respondent who has not taken any cross-objections to the partial decree passed against him could urge in opposition to the appeal of the plaintiff, a contention, which, if accepted by the trial Court would have necessitated the total dismissal of the suit. The judgment of the PrivyCouncil in *Sheikh Rahmat Ilahi* v. *Mahomed Hayat Khan*[5] explains the scope of sections 100 and 103 of the Civil Procedure Code and holds that the failure to appreciate and determine a question of fact which vitally affects the issue stated in the case will be a question of law. *Hem Raj* v. *Khem Chand*[6] is a decision of the Privy Council laying down the effect of " special leave " granted by His Majesty in Council, namely, that where such leave is given the respondents cannot raise the objection that the appeal is incompetent as the sum involved is below Rs. 10,000 and that the case is otherwise not a fit one for appeal under the Civil Procedure Code. *Ramanathan Chettiar* v. *Kasi Chettiar*[7] points out the scope of an order for stay passed under Order 21, rule 29 that it extends only for the duration of the pending suit and no longer. In *Bhawani Shankar Joshi* v. *Gordhandas Jamnadas*[8], the Judicial Committee lays down that ratification in law is equal to previous authority and therefore would validate the assignment of a decree by an agent who had no authority at the time of the execution so as to enable the assignee to apply under Order 21, rule 16 of the Civil Procedure Code. *Nachimuthu Chetti* v. *Palani Ammal*[9] holds that the holder of a money decree for a larger sum can claim a set off of such sum against the entire sum due under a mortgage decree held against him by his judgment-debtor for a lesser sum. In *Rohini Ramandwaj Prasad Singh* v. *Har Prasad Singh*[10], the Privy Council makes it clear that where a decree is varied or reversed in circumstances giving rise to a right by way of restitution, the right arises automatically and is claimable under section 144 before the trial Court.

Criminal Procedure Code.—Ranga Konar v. *Pakkiri Vattachi*[11] emphasises that although it is not necessary under section 422 of the Criminal Procedure Code to give notice to a complainant of the filing of an appeal though he was awarded compensation, still it is always a salutary practice to do so. In re *Sevagaperumal*[12] lays down that it is obligatory for the Appellate Court to obtain and examine the records at the time of hearing and hence where the records are destroyed by fire in the trial Court and no copies are available the only course possible is to order a re-trial. The ruling in *Thakur Shah* v. *King-Emperor*[13] of the Privy Council is of importance and points out that section 423 gives wide powers to the Court to amend a charge in an

---

1. (1943) 1 M. L. J. 212 : I.L.R. (1943) Mad. 696.
2. (1943) 2 M.L.J. 57 (F.C.).
3. (1943) 2 M.L.J. 539 : I.L.R. (1943) Mad. 702.
4. (1943) 2 M.L.J. 336 (F.B.).
5. (1943) 2 M.L.J. 606 (P.C.).
6. (1943) 2 M.L.J. 397 (P.C.).
7. (1943) 2 M.L.J. 452.
8. (1943) 2 M.L.J. 48 (P.C.).
9. (1943) 2 M.L.J. 596.
10. (1943) 2 M.L.J. 460 (P.C.).
11. (1943) 1 M.L.J. 493.
12. (1943) 1 M.L.J. 129.
13. (1943) 2 M.L.J. 532 (P.C.).

Department of Law Library
Acc. No. J 20297
Date...............

appeal subject only to the limitation that no course should be taken by reason of which the accused may be prejudiced either because he was not fully aware of the charge made or is not given a full opportunity of meeting it.

Registration Act.—Subramanian Chettiar v. *Meyammai Achi*[1] lays down the important rule in the law of registration that a document which creates a right to or in immovable property requires registration and where it is not registered it is inadmissible in evidence. In *Subbarama Reddi* v. *Subba Reddi*[2] it is held by a Full Bench that in the absence of any male agnate of the husband the father of a minor girl will be a natural guardian within the meaning of section 32 of the Registration Act to present a will of the girl's deceased husband for registration. A noteworthy point is laid down by the Full Bench in *Subramanian Chettiar* v. *Arunachalam Chettiar*[3], which decides that an unregistered document relating to immovable property may be received as evidence of the contract relating to the same and is sufficient to support a suit for specific performance.

Court-fees.—The law relating to court-fees is clarified in a number of pronouncements. In re *Sevugan Chettiar*[4], a beneficial principle is propounded that where the original certificate for the refund of court-fee paid on a memorandum of grounds of appeal is shown to have been lost, the Court may grant a duplicate certificate specifying therein that it was issued on the representation that the original had not been cashed. The court-fee payable on a claim for dissolution of a partnership at will with a claim for accounts was held in *Manikyala Rao* v. *Pillayya*[5] to be covered by section 7, sub-section 4, clause (*f*), the intervention of the Court not being necessary to bring about the dissolution.

L P 2348

Limitation.—Some of the decisions on the law of limitation are highly interesting. In *Lala Hemchand* v. *Peare Lall*[6] the Privy Council has held that section 10 of the Limitation Act is inapplicable where the provision in a will creating a charitable trust is inoperative in law and that the position of the executor will be adverse to that of the heir-at-law, so much so, if he holds it for the statutory period on behalf of the charity, the title acquired by the charity would vest in it and bar the title of the heirs of the testator. The scope of section 10 as not being limited to tracing actions is made clear in *Chidambara Vinayagar Devasthanam* v. *Chidambaram Chettiar*[7] which holds that the section is applicable to a case where the trustee or the legal representative is asked to account for the money that was in his hands as a trustee. *Srinivasalu Chetti* v. *Munisami Chetti*[8] deals with an important question under section 6 and lays down that where the existence of a reversioner at the date of the challenged alienation clothes an after-born nearer reversioner with a right to sue, though the latter cannot in his own right claim the benefit of section 6, yet, he can avail himself of the extended period which will be available to the reversioner who was in existence at the time of the alienation, he also being then a minor. Disapproving the view expressed in *Shankara Menon* v. *Kuttani*[9] the decision in *Seth Nandaram Das Atmaram* v. *Zulika Bibi*[10] holds that where a party is already on the record either as a plaintiff or as a defendant an amendment which merely alters the capacity in which he has been impleaded to one of a different character does not involve an addition of parties so as to attract the provisions of section 22 of the Limitation Act. The ruling in *Raghaviah* v. *Vasudevayya Chetti*[11] lays down that for purposes of section 14 though good faith of a party might normally be established by his acting upon professional advice still where the advocate himself did not act in good faith, his client cannot rely upon his advice as establishing his own good faith. As to what is a "final order" within the meaning of article 182 (5) has been settled by a number of decisions. The result that emerges from them is that an order putting an end to the application in question, where it is one in accordance with law, is a final

1. (1943) 2 M.L.J. 15.
2. (1943) 1 M.L.J. 272 : I.L.R. (1943) Mad. 462 (F. B.).
3. (1943) 2 M.L.J. 424 (F.B.).
4. (1943) 2 M.L.J. 377.
5. (1943) 2 M.L.J. 130.
6. (1943) 1 M.L.J. 11 (P.C.).
7. (1943) 2 M.L.J. 339.
8. (1943) 1 M.L.J. 157.
9. A.I.R. 1940 Mad. 639.
10. (1943) 2 M.L.J. 1.
11. (1943) 2 M.L.J. 375.

UNIVERSITY OF CALCUTTA
NOT TO BE RE...
DEPARTMENT OF LAW

order, whether the application was numbered or not, directed to be registered or not, or was admitted or not. See *Ramachandra Naidu* v. *Muthu Chettiar*[1], *Shanmugham Pillai* v. *Namagiri Ammal*[2], *Mahalakshmi Ammal* v. *Subramania Chettiar*[3]. And in *Govind Prasad* v. *Pawan Kumar*[4], it is pointed out by Sir Madhavan Nair that the words "in accordance with law" in article 182 (5) of the Limitation Act mean "in accordance with the law relating to the execution of decrees."

JOTTINGS AND CUTTINGS.

Unusual Oaths.—The Court at Croydon recently witnessed the unusual spectacle of an Englishman with upraised arm taking the oath in the following form: "I swear as in the presence of Buddha that I am unprejudiced, and if what I speak prove false, or if by my colouring truth others shall be led astray, then may the three holy existences together with the devotees of the twenty-two firmaments, punish me and also my migrating soul." A Hindu, I believe, must swear facing the Ganges and this once created some difficulty at Brighton Police Court. It was at Brighton that, for the benefit of a Mohamedan witness, they produced from the public library the Koran found in the private apartments of the King of Delhi when the City was taken in 1857. About a year ago an extremely unusual oath was taken at Clerkenwell County Court when a man claiming to be King of Poland swore by Apollo to give true evidence. All these oaths have less dramatic emphasis than the Chinese form requiring the breaking of a saucer with the addition of the words: "The saucer is cracked. If I do not tell the truth my soul will be cracked like the saucer." Avory, J., once tried a case at Liverpool arising out of a feud between two Chinese gangs. So many witnesses went into the box that by the time the last one appeared he was ankle deep in crockery. It was at Liverpool County Court that a witness was provided with a saucer so solid that it rebounded intact when thrown down. After three attempts it was broken by being hammered on the floor.—*S.J., 1943, p. 75.*

The McNaghten Rules and the Encephalograph.—In *R.* v. *Lees Smith*, on 17th March, the charge was one of murder, and medical evidence was given that the prisoner had visited a hospital in order to have mental tests taken by an electrical instrument called the encephalograph, which showed that he had an abnormal personality associated with minor defects of the nervous system or, as his counsel described it, "a brain with distorted and exaggerated rhythms." In his summing up the learned Judge said that the prisoner's abnormalities prevented him for having the same chance in life as other people, but, he asked, were they such as to constitute a mental disease which either made him unable to know what he was doing, or unable to know what he was doing was wrong. Every one of the doctors had said, his lordship stated, that the accused knew what he was doing and knew he was doing wrong. His Lordship explained the rules in the *McNaghten case*, and said that he could not advise the jury that the rules applied to the present case. The jury nevertheless found a verdict of "Guilty, but insane." This verdict cannot be regarded as a freak decision, or as the result of a superstitious veneration for a medical invention, the significance of which the jury failed to understand, but as a considered rejection of the McNaghten rules when in accordance with the law as it stands to-day, it is sought to apply them to a case where there is conclusive scientific evidence of serious abnormality. The learned Judge advised the jury that they could add a rider to their verdict, possibly one of a recommendation of mercy. There can be little doubt that in the face of strong medical evidence of abnormality such a rider would have received most careful consideration by the proper authorities, but the jury seems to have been conscious of the same apparent defect in the McNaghten rules as that to which McCardie, J., impliedly referred in his summing up in the *Ronald True case.* (*The Times* 6th May, 1922): "I shall put this point to you—that even if the prisoner knew the physical nature of the act and that it was morally wrong and punishable by law, yet was he through mental disease deprived of the power of controlling his actions at the same time? If 'yes', then in my view of the law, the verdict should be 'guilty, but insane'." There is, however, another view, put forward at its highest limit by the Lord Chief Justice in *R.* v. *Kopsch*, (1925) 19 Cr.App. R. 50: "It is the fantastic theory of uncontrollable impulse which, if it were to become part of our criminal law, would be merely subversive." Greer, J., in *R.* v. *True*, 16 Cr.App. R. 164, seemed to lean to the view that uncontrollable impulse would bring a case within the *McNaghten rules* if a man's will power was so destroyed by mental disease as to destroy his power of knowing what he was doing or of knowing that it was wrong. The question is fraught with difficulty, but, as Greer, J., said in that case a man's mind is not divided into separate compartments, and it may well be that a solution can be found by a summing up on the lines indicated by that great judge in cases where there is scientific evidence of serious abnormality.—*S.J., 1943, p. 105.*

---

1. (1943) 1 M.L.J. 236.
2. (1943) 2 M.L.J. 454.
3. (1943) 2 M.L.J. 513.
4. (1943) 2 M.L.J. 121 (P.C.)